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Zoning--City-Wide Ban on Billboards Unconstitutionally Exceeds Zoning Powers of a Municipality

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ZONING—CITY-WIDE BAN ON BILLBOARDS UNCONSTITUTIONALLY EXCEEDS ZONING POWERS OF A MUNICIPALITY. *Combined Communications Corp. v. City & County of Denver*, — Colo. —, 542 P.2d 79 (1975).

In 1971, the city and county of Denver enacted the Denver Sign Code;[1] a set of seven ordinances designed to eliminate all outdoor billboards within the city over a five year period. Plaintiff, owner of an outdoor advertising business, challenged the validity of two of the ordinances[2] and the district court upheld the claim,[3] permanently enjoining enforcement of the ordinances.[4] In *Combined Communications Corp. v. City & County of Denver*,[5] the Colorado Supreme Court affirmed the district court decision, holding the city was not empowered by its police or zoning power to enact ordinances prohibiting an entire industry from operating anywhere within the city.

The question faced by the Colorado Supreme Court is being considered for the first time by a number of jurisdictions[6]—can a major city undertake a beautification campaign that calls for a city-wide ban on all off-premises advertising devices? Courts that have considered the issue have reached opposite conclusions. The traditional rule is that a city cannot enforce a zoning ordinance based solely on aesthetic considerations.[7] Jurisdictions adhering to this rule require that sign control

1. DENVER, COLO., REV. MUN. CODE § 617 (1971).
2. *Id.*, Ordinances No. 94 & 95.
3. Combined Communications Corp. v. City & County of Denver, — Colo. —, 542 P.2d 79 (1975).
4. The district court decision came on remand from a prior appeal, 186 Colo. 443, 528 P.2d 249 (1974). In that proceeding, the Colorado Supreme Court reversed the district court's decision to issue a preliminary injunction restraining the city from enforcing the ordinances until a hearing on the merits. The court denied the injunctive relief on two bases: first, that a preliminary injunction should not be enforced when less than two months remained until trial on the merits and, secondly, that plaintiffs had purchased their business with knowledge of the ordinances and then delayed twenty-one months before commencing an action.
5. — Colo. —, 542 P.2d 79 (1975).
6. Numerous cities and counties in California have undertaken varied forms of sign regulation. For an overview of the California response to scenic pollution see Note, *State and Local Billboard Control in California*, 11 CAL. W.L. REV. 193 (1974).
7. The traditional view—which has been, and to great measure still is, followed in most states—is that restrictions on the use of property cannot validly be based solely on aesthetic considerations, such considerations in themselves not being a proper object of the police power, but that ordinances which serve other zoning purposes will be upheld even though an aesthetic purpose is present as well.

A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 14.01, at 14-1 (4th ed. 1975) (footnote omitted).

ordinances bear a substantial relationship to public health, safety, morals or welfare to be valid as an exercise of the city's police power.[8] A growing number of jurisdictions, however, are following the rule announced in *Berman v. Parker*.[9] Under this doctrine, aesthetically motivated sign control ordinances are not necessarily invalid simply because they are unrelated to the normal police power objectives.[10] The majority opinion of the Colorado Supreme Court appears to side with the traditional view of legitimate police power objectives in holding that Denver's ordinances unconstitutionally exceeded the city's zoning authority.

The two ordinances at the heart of the controversy were broadly structured to eliminate all off-premises billboards.[11] Ordinance No. 94 repealed sections of the Denver zoning ordinance that permitted a "use by right" to outdoor advertising devices in certain zoned districts, thereby preventing the erection of any new billboards within the city. Ordi-

8. Early cases laying the foundation for invalidating billboard control ordinances on aesthetic grounds alone include Varney & Green v. Williams, 155 Cal. 318, 100 P. 867 (1909); Curran Co. v. Denver, 47 Colo. 221, 107 P. 261 (1910); Chicago v. Gunning Sys., 214 Ill. 628, 73 N.E. 1035 (1905); Crawford v. Topeka, 51 Kan. 756, 33 P. 776 (1893); Bill Pasting Sign Co. v. Atlantic City, 71 N.J.L. 72, 58 A. 342 (1904). Modern courts following this view include *In re* Appeal of Ammon R. Smith Auto Co., 423 Pa. 493, 223 A.2d 683 (1966); Norate Corp. v. Zoning Bd. of Adjustment, 417 Pa. 397, 207 A.2d 890 (1965).

9. 348 U.S. 26 (1954). Justice Douglas, speaking for the United States Supreme Court, expanded the traditional application of the police power to municipal affairs to include aesthetic considerations:

> The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Id. at 33 (citation omitted).

10. Decisions following the modern doctrine of accepting aesthetic considerations as, at least in part, a valid basis for sign control ordinances include E.B. Elliot Advertising Co. v. Metropolitan Dade County, 425 F.2d 1141 (5th Cir. 1970); State v. Diamond Motors, Inc., 50 Hawaii 33, 429 P.2d 825 (1967); Jasper v. Commonwealth, 375 S.W.2d 709 (Ky. 1964); Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967); Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1965).

11. Off-premises signs are those relating to products, services or uses not found on the same zone lot as the signs. Unaffected by the Denver ordinances were advertising devices, displays, and signs on a business' own premises used to attract attention to its services or products. Ordinance No. 90 expressly exempted from its "off-premises sign" classification

> (1) [f]lags of nations or an organization of nations, states and cities, fraternal, religious and civic organizations; (2) merchandise, pictures or models of products or services incorporated in a window display; (3) time and temperature devices not related to a product; (4) national, state, religious, fraternal, professional and civic symbols or crests; (5) works of art which in no way identify a product. If for any reason it cannot be readily determined whether or not an object is a sign, the Department of Zoning Administration shall make such determination.

nance No. 95 required the removal of all existing outdoor signs over a five year period in accordance with an amortization schedule.[12]

While the lower court struck down the two ordinances on a number of grounds,[13] the supreme court predicated its decision on only two of those holdings; (1) that Ordinance No. 94 was an ultra vires act because it exceeded the grant of authority to the Denver City Council by the city's charter, and (2) that if Ordinance No. 94 failed, No. 95 would fall along with it.[14] The court then held that whether the city relied on its police power or its zoning powers[15] to justify the ordinances, the test for validity under either course was the standard of reasonableness.[16]

12. Amortization involves the elimination of nonconforming uses, without payment of compensation, by allowing a reasonable period of time over which the value of the nonconforming use is amortized. With sign amortization, for instance, a city may exernise its zoning authority to require all signs in a given district be removed within a designated period of time. If the period is reasonable, the value of each sign is amortized by its owner over the period and he writes off his losses as income tax expenses when the period expires. For an analysis of what constitutes a reasonable amortization period see Art Neon Co. v. City & County of Denver, 357 F. Supp. 466 (D. Colo. 1973), holding a five year period to be reasonable.

13. The district court found that Ordinance 94 was an ultra vires act, that the definitions of "outdoor general advertising device" and "sign" contained in the ordinance unconstitutionally delegated legislative authority to the Zoning Administrator, that Ordinances 94 and 95 constituted a taking of property without just compensation violative of the fifth amendment, that Ordinance 95 violated state law on a matter of state-wide concern and that Ordinances 94 and 95 violated the plaintiff's freedom of speech. — Colo. at —, 542 P.2d at 81.

14. The supreme court found Ordinance 95 so "intertwined" with Ordinance 94 that, as written, it would become inoperative should 94 fail. If the city did not possess the power to prevent the erection of new billboards within the city, it follows that it was not empowered to require the demolition of existing signs.

15. Police power is the inherent power which lies within the state and which enables the legislature to enact laws regulating or prohibiting anything harmful to the welfare of the people.

. . . .

Municipalities, as such, have no police power. The residual police power reposes in the state and not in any of its political subdivisions. A municipality can only exercise police power when it has specifically or impliedly received a delegation of such power from the state. And it can only exercise such power as has been delegated to the extent, and in the manner, delegated.

. . . .

The authority to enact zoning ordinances, the matters which may be regulated thereunder, and the manner in which they may be enacted or amended, must be specifically delegated to municipalities for them to exercise the power to zone.

. . . .

The delegation of power to zone is found in the zoning enabling acts of the various states . . . .

A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 2.01, at 2-2, 2-7 to 2-9 (4th ed. 1975).

16. In Art Neon Co. v. City & County of Denver, 488 F.2d 118, 122 (10th Cir. 1973), the Tenth Circuit noted some of the factors commonly considered by courts in applying the test of reasonableness:

These include the nature of the nonconforming use, the character of the structure, the location, what part of the individual's total business is concerned, the

Under this standard, the ordinance in question must bear a reasonable relationship to a legitimate legislative purpose,[17] usually judicially interpreted to mean the ordinance must conform to serving one or more of the traditional police power objectives of public health, safety, morals or welfare.[18]

In applying the reasonableness standard to the Denver ordinances, the majority opinion confined its analysis to the effect the ordinances would have on the outdoor advertising business in the city, and rejected the city's argument that the billboard industry was only one segment of the advertising business and not a separate industry.[19] Since the ordinances would unquestionably prohibit the erection or maintenance of any billboards in the city, the court found that enforcement would restrain the operation of the entire outdoor advertising industry in Denver. Under the court's limitation of police power a city-wide prohibition of a distinct and separate industry is valid only if the entire industry constitutes a public nuisance.[20] The court made clear that it did not consider outdoor signs to be inherently a public nuisance.

> Since the outdoor advertising industry is a separate and distinct industry, the effect of Ordinance 94 is to completely prohibit the improvement and extension of that industry in the entire city. Under a concept of reasonableness, the charter authorization of regulation does not permit Denver under its zoning power to prohibit this entire industry. . . .
> . . . [T]he power to regulate does not include "any power, . . . express or inherent, to prohibit."[21]

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time periods, salvage, depreciation for income tax purposes, and depreciation for other purposes, and the monopoly or advantage, if any, resulting from the fact that similar new structures are prohibited in the same area. Where signs are concerned, the courts usually also mention the fact that the use is also of public streets since the message is directed to the passerby.

17. Goldblatt v. Hempstead, 369 U.S. 590 (1962); Nebbia v. New York, 291 U.S. 502 (1933); Markham Advertising Co. v. State, 73 Wash. 2d 405, 439 P.2d 248 (1968).

18. Berman v. Parker, 348 U.S. 26, 32 (1954). *But see* City of Escondido v. Desert Advertising, Inc., 8 Cal. 3d 785, 505 P.2d 1012, 106 Cal. Rptr. 172, *cert. denied*, 414 U.S. 828 (1973).

19. The argument that on-premises business identification signs and off-premises billboards are merely facets of the same industry has been largely discredited. United Advertising Corp. v. Borough of Raritan, 11 N.J. 144, 150, 93 A.2d 363, 365 (1952). *See also* Markham Advertising Co. v. State, 73 Wash. 2d 405, 439 P.2d 248 (1968).

20. The Colorado Supreme Court furnished no basis for its conclusion that outdoor signs were not a public nuisance. It seems, however, that the court used a very narrow construction of the term "public nuisance" to reach the result it desired. While courts have been reluctant to classify billboards a nuisance simply because they are unsightly, they have, under a nuisance theory, upheld bans on the basis that such signs posed a threat to traffic safety. Markham Advertising Co. v. State, 73 Wash. 2d 405, 439 P.2d 248 (1968). *See also* Annot., 38 A.L.R.3d 647 (1971).

21. 542 P.2d at 82-83 (citation omitted).

The dissenting opinion argued that while the majority correctly decided the applicable test was one of reasonableness, the court failed to properly apply the test to the Denver ordinances. The real issue, according to the dissent, was "[w]hether the City in the reasonable exercise of its police power may prohibit the erection of new off-premises, outdoor billboards."[22] A city's authority to act under its police power is dependent upon whether the action taken is not arbitrary or unreasonable and bears a substantial relationship to public health, safety, morals and general welfare.[23] Thus, a determination of the reasonableness of the Denver ordinances required not only an analysis of the effect of the restrictions on the billboard industry (to which the majority had limited its inquiry), but also an examination of the desired impact of the ordinances on the city. Following the extended reasoning of the dissent, the proper test of reasonableness is a balancing of the competing interests. The city's interest in promoting aesthetic values must be measured against the economic interests of the outdoor advertising industry.[24]

The majority holding in *Combined Communications* confirms the suspicion shared by many commentators[25] that courts will largely be unreceptive to city-wide bans on off-premises signs in major municipalities, regardless of the motivation behind the ordinances. Although courts have upheld ordinances similar to those invalidated here, the towns have tended to be small and without large central business districts.[26] A notable exception, though unchallenged in the courts, is a zoning ordinance recently enacted by the city of San Diego,[27] which resembles the Denver ordinance and is designed to enhance the city's appearance by eliminating all off-premises advertising devices. Presently, San Diego is the only major metropolitan city with an ordinance completely prohibiting billboards.

A number of jurisdictions have ordinances limiting billboards to

22. *Id.* at 83 (Kelley, J., dissenting).
23. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
24. The dissent expressed no opinion on the outcome of the case, noting only that it would remand the matter to the district court for determination under the balancing test.
25. *See* C. CRAWFORD, HANDBOOK OF ZONING AND LAND USE ORDINANCES 86-97 (1974); D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT 737-47 (1963); F. WILLIAMS, THE LAW OF CITY PLANNING AND ZONING 392-93 (1922); N. WILLIAMS, JR., THE STRUCTURE OF URBAN ZONING 90-91 (1966).
26. United Advertising Corp. v. Borough of Metuchen, 42 N.J. 1, 198 A.2d 447 (1964); Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967).
27. SAN DIEGO, CAL., CODE § 101.700 *et seq.* (1972).

certain districts within a city. In *Schloss v. Jamison*,[28] the North Carolina Supreme Court upheld an ordinance prohibiting the erection of billboards in downtown Charlotte, the state's largest city. The court found the city's purpose in enacting the ordinance, to create a "first-class business and commercial district," was neither arbitrary nor discriminatory.[29]

Oklahoma courts have not confronted the task of determining the validity of a city-wide off-premises sign control ordinance. The potential for such a suit exists. Sign regulation is within the police power of the state of Oklahoma.[30] This regulatory authority is delegated by statute[31] to municipalities. As a result, any city within the state can pursuant to its police power enact zoning ordinances regulating the erection and maintenance of billboard signs.

The problem of environmental deterioration in core cities necessitates allowing governing bodies to consider aesthetic values; otherwise cities will not be able to cope with situations similar to those faced by Denver.[32] The Colorado Supreme Court's blanket rejection of unilateral sign control, ignores the complex problem of visual pollution. As a result, the cities are left with little, if any, effective means of eliminating or controlling the problem of visual pollution caused by the continued use of billboard signs.

While a complete prohibition of off-premises billboards, motivated solely by aesthetic considerations, may be neither valid nor desirable, prohibitory measures should be more seriously scrutinized when based on other considerations.[33] As the dissent in *Combined Communications* advocates, only when all the public considerations behind such an

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28. 262 N.C. 108, 136 S.E.2d 691 (1964).

29. Obviously, the legislative intent was to establish a first-class business and commercial district in the heart of the downtown area. In our view, it was permissible for the City Council to determine that the accomplishment of this purpose would serve the entire city . . . . Moreover, we think it was permissible for the City Council to determine that it would be advantageous to the owners and occupants of property [within the district] and would enhance its status as a first-class business and commercial district to limit advertising signs within the district to those defined in the ordinance as business signs.

Id. at —, 136 S.E.2d at 697.

30. Gibbons v. Missouri, K.&T. Ry., 142 Okla. 146, 285 P. 1040 (1930).

31. OKLA. STAT. tit. 11, § 401 (1971) provides in pertinent part:

For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict . . . structures and land for trade, industry, residence or other purposes.

32. 542 P.2d at 83-84 (Kelley, J., dissenting).

33. For example, the city of Denver not only claimed the billboards were a source of visual pollution, but also argued that they posed a hazard to driving safety.

ordinance are balanced against the harm to the affected economic interests can the reasonableness of sign control ordinances be ascertained. By refusing to entertain the question, the Colorado Supreme Court can only delay, not preclude, consideration of a city's authority to initiate aesthetic zoning. Unfortunately, for Denver and other cities in Colorado, this delay may prove fatal.

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